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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SEAN MAZELLI,

Plaintiff and Appellant,

v.

SULLIVAN SOLAR POWER
OF CALIFORNIA, INC.,

Defendant and Respondent.

D073486

(Super. Ct. No. 37-2016-00014511-
CU-OE-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Joel Wohlfeil, Judge. Affirmed.

Justice Law Group and Nicholas J. Lewis for Plaintiff and Appellant.

Pettit Kohn Ingrassia Lutz & Dolin, Thomas S. Ingrassia, Jenna H. Leyton-Jones, Ryan H. Nell and Jennifer P. Suberlak for Defendant and Respondent.

Sean Mazelli appeals a judgment entered after the trial court summarily adjudicated his wage and hour related claims in favor of his former employer, Sullivan Solar Power of California, Inc. (Sullivan). Mazelli contends that the court erred when it refused to admit

into evidence his written compensation agreement with Sullivan. He asserts that consideration of this agreement requires that the judgment against him be reversed. We conclude that the trial court properly excluded the compensation agreement because Mazelli failed to authenticate the document. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Sullivan installs residential and commercial solar power systems and employs individuals to develop and assist in the installation of these systems. Sullivan hired Mazelli in 2006. From 2014 through the end of his employment, Mazelli worked as a commercial project developer (CPD). He earned a salary and had opportunities to earn bonuses. Mazelli took a leave of absence on March 16, 2015 and never returned to work. He resigned his employment on June 22, 2015.

In May 2016 Mazelli filed this action alleging the following claims against Sullivan: (1) failure to compensate for all hours worked in violation of Labor Code section 204; (2) waiting time penalties pursuant to Labor Code section 203; (3) violation of Business & Professions Code section 17200; (4) failure to provide timely and accurate wage statements in violation of Labor Code 226; (5) breach of contract; and (6) unjust enrichment.¹ About a year later, Sullivan moved for summary judgment, alternatively, summary adjudication of Mazelli's claims in its favor.

¹ We refer to the first, second and fourth causes of action as the wage and hour claims.

As relevant to this appeal, Mazelli alleged that Sullivan failed to pay him for bonuses earned on two projects, the "NAMM" project and the St. Michael's project (together, the two projects). Sullivan argued that it was entitled to judgment on Mazelli's first cause of action for unpaid wages because Mazelli's deposition testimony showed that he did not satisfy the conditions precedent for him to earn a bonus on these projects. Because it timely paid Mazelli all earned wages upon his discharge, Sullivan argued that Mazelli's second and fourth causes of action for waiting time penalties and failure to provide accurate wage statements failed. Finally, because Mazelli's substantive claims failed, Sullivan argued that his derivative claim for a violation of Business & Professions Code section 17200 also failed.

Mazelli opposed the motion arguing that Sullivan erroneously relied on his deposition testimony to establish his right to a bonus, rather than the terms of his written compensation agreement with Sullivan. The compensation agreement is a two-page document. The second page contains the signatures of Mazelli and a Sullivan representative and the dates they signed.² The first page of the document is not signed. Mazelli relied on paragraph 4, entitled "Termination of Employment," on the first page of the document. This paragraph provided:

"A CPD who is discharged or resigns prior to a bonus being earned on a project for which the CPD was the primary bidder and the Company won the bid will continue to earn percentage bonus payments for that project if on site work has commenced for the project prior to the CPD's last day of employment. Percentage

² Mazelli did not include a copy of this document in his appellant's appendix. Sullivan, however, included a copy in its respondent's appendix.

bonuses will continue to be paid to the CPD after the last day of employment only if work has commenced prior to the CPD's last day of employment. If work has not commenced prior to the last day of employment, no further bonuses shall be paid to the CPD beyond any payments already paid to the CPD."

Mazelli asserted that he was the CPD for both projects, that work had started on the projects before his last day of employment, and paragraph 4 of the compensation agreement established his right to bonus payments on the projects. Sullivan argued that the compensation agreement was inadmissible because Mazelli refused to authenticate the agreement during his deposition.³

The trial court granted the motion for summary adjudication with respect to Mazelli's first through fourth causes of action. The court held that Sullivan's evidence showed that Mazelli was not entitled to compensation on the two projects because a CPD became eligible to earn a bonus on a project only if project construction is completed and Sullivan received full payment on the project before the CPD's employment termination date, but that the two projects were not completed prior to Mazelli's resignation. The court concluded that the compensation agreement cited by Mazelli was inadmissible because Mazelli denied agreeing to the terms set forth on the first page of the agreement.⁴

³ Mazelli attempted to remedy this alleged defect below by filing a surreply and supplemental surreply. The trial court refused to consider these documents because they were untimely filed. Mazelli does not rely on these documents in this appeal and they will not be discussed.

⁴ The court also granted the motion with respect to Mazelli's fifth cause of action for breach of contract, which is not a subject of this appeal. It denied the motion with respect to Mazelli's sixth cause of action for unjust enrichment and Mazelli later dismissed this cause of action with prejudice.

The trial court entered a judgment in Sullivan's favor. Mazelli timely appealed, contesting the ruling as to his wage and hour claims and his cause of action for violation of Business & Professions Code section 17200.

DISCUSSION

I. GENERAL LEGAL PRINCIPLES

We independently review an order granting summary judgment or adjudication, viewing the evidence in the light most favorable to the nonmoving party. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) We first identify the issues framed by the pleadings because it is those issues the papers must address. (*Clark v. Baxter Healthcare Corp.* (2000) 83 Cal.App.4th 1048, 1054.) Second, we determine if the moving party's evidence demonstrates the opponent cannot establish its claim and justifies a judgment in the moving party's favor. (*Ibid.*) Lastly, we determine whether the opposing party's evidence demonstrates a triable issue of material fact. (*Ibid.*) In determining whether there are triable issues of fact, we consider all the evidence set forth by the parties except that to which objections have been made and properly sustained. (Code Civ. Proc., § 437c, subd. (c); *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

To create a triable issue of material fact, a party opposing a summary judgment motion must present admissible evidence. (Code Civ. Proc., § 437c, subd. (d).) We consider and construe liberally only admissible evidence in deciding whether there is a triable issue of fact. (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 761.) "Documents obtained in discovery in response to a request for production of documents may be used to support or oppose a motion for summary judgment, but must be presented in admissible form. This

means the evidence must be (1) properly identified and authenticated, (2) admissible under the secondary evidence rule, (3) nonhearsay or admissible under some exception to the hearsay rule, and (4) a complete record, not selected portions of the document. [Citation.] Unless the opposing party admits the genuineness of the document, the proponent of the evidence must present declarations or other 'evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is.' " (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 855.)

II. ADMISSIBILITY OF COMPENSATION AGREEMENT⁵

The trial court's ruling on Mazelli's wage and hour claims turned on the admissibility of a document purporting to be Mazelli's compensation agreement with Sullivan. Mazelli claims that the court erred when it ruled that the compensation agreement was inadmissible because a careful reading of his deposition testimony shows that he signed the agreement. Sullivan argues that Mazelli repeatedly testified at his deposition that he did not recognize the first page of the compensation agreement, which included the allegedly relevant "termination of employment" provision, to be part of the document that he signed. Sullivan asserts that the trial court properly excluded the entire document in deciding the motion because Mazelli failed to properly authenticate it, despite repeated opportunities.

⁵ Sullivan argues that Mazelli's opening brief fails to state the facts in a manner consistent with the standard of review, and thus Mazelli has forfeited any alleged error. We decline to address this issue and exercise our discretion to decide the appeal on its merits.

The standard of review to apply when analyzing evidentiary objections related to a summary judgment motion depends on the nature of the objection. "De novo review is proper where evidentiary objections raise questions of law, such as whether or not a statement is hearsay. [Citations.] In contrast, evidentiary objections based on lack of foundation, qualification of experts, and conclusory and speculative testimony are traditionally left to the sound discretion of the trial court [and reviewed for abuse of that discretion]." (*Alexander v. Scripps Memorial Hospital La Jolla* (2018) 23 Cal.App.5th 206, 226.) Determining whether a document has been properly authenticated requires us to apply the law to the facts presented by the parties. Accordingly, we apply the de novo standard to the trial court's ruling on the admissibility of the compensation agreement. (See *Apex LLC v. Sharing World, Inc.* (2012) 206 Cal.App.4th 999, 1009 ["if application of the law to the facts is primarily legal in nature, the de novo standard applies"].)

Any writing must be authenticated before the writing, or secondary evidence of its content, may be introduced into evidence. (Evid. Code,⁶ § 1401.) "Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." (§ 1400.) "A writing may be authenticated by anyone who saw the writing made or executed" (§ 1413) or "by evidence that: [¶] (a) [t]he party against whom it is offered has at any time admitted its authenticity; or [¶] (b) [t]he writing has been acted upon as authentic by the party against whom it is offered." (§ 1414.)

⁶ Undesignated statutory references are to the Evidence Code.

"Documents used in support of a motion for summary judgment must be properly authenticated or they may not be considered." (*Callahan v. Chatsworth Park, Inc.* (1962) 204 Cal.App.2d 597, 606; *Dixon v. Grace Lines, Inc.* (1972) 27 Cal.App.3d 278, 290 [unauthenticated letter could not be considered in support of summary judgment motion].)

The question before us is whether, at deposition, Mazelli properly authenticated a document as the compensation agreement he had entered into with Sullivan. To address this question we set forth the relevant portions of Mazelli's deposition testimony after Sullivan's counsel marked the document as exhibit 3:

"Q I'll ask you to take a look and let me know if you recognize that document.

"A Yeah. Second page definitely. I think. I mean, I didn't initial the first page. But, you know, the second page looks—definitely my signature there.

"Q All right. Well, let's start with that. As you sit here today, do you recognize both pages of this document?

"A I definitely signed the second page.

"Q Okay.

"A But I'd probably have to take some time to look at the front one to make sure this is what I signed.

"Q Okay. Take whatever time you need.

"A I guess I couldn't say certain on the first page but definitely on the second page.

"Q Okay. [¶] As you sit here today, do you have any reason to believe that the first page of the document is not the first page of the document you actually signed?

"A Do I have reason to believe? Yeah. I mean, I have reason to believe, I guess. I mean, I don't know. I don't—I don't have any—there's no signature on there. So, I mean, I kind of wish I had initialed it so I would know.

"Q Okay. [¶] Well, is anything on page 1 of the document inconsistent with your recollection of the contract you signed?

"A Well, I never got paid like this. Like this—

"Q Let me—let's—and that's not a question. Let me just ask the question. Is anything on page 1 of the document inconsistent with what you recall signing and negotiating?

"A Yes.

"Q What is inconsistent?

"A The earned bonus requirement we negotiated to be not fixed. So, yes. So the initial—so even—so that kind of—

"Q Which specific thing (unintelligible due to interruption)—

"A So the thousand dollars—that thousand dollars was supposed to be kind of fluid. So, if I collected more than the down payment of whatever was on the contract, then I would get more. [¶] So it was more of a percentage base, not just a thousand dollars. So it doesn't line up with—with what we spoke about.

"Q Well, let's look at—page 2 is dated April 5th, 2014. Do you see that? April 15 it looks like, actually.

"A Yeah.

"Q And that's your signature, right?

"A Right.

"Q And that's your handwriting underneath where it says 'Sean Mazelli'?

"A Yeah.

"Q Okay. [¶] So is it possible that this is what you signed on April 15th and then you negotiated something different on the earned bonus requirement after that?

"A No, I doubt I would have signed it if it wasn't what we agreed to.

"Q So what is it you recall agreeing to?

"A Or maybe he agreed to it verbally after. I don't know.

"Q That's what I'm asking.

"A Yeah.

"Q So in practice how—how was that thousand dollars or that CPD earned bonus requirement calculated?

"A In practice—like normally how is it calculated is what you're saying?

"Q After you signed this agreement, how were those earned bonus payments calculated? Were they inconsistent with what it says in paragraph 2 here?

"A Normally when I got paid—

"Q Yes.

"A —is that what you're saying?

"Q Yes.

A Yeah, because I would never get anything until project was done. It would never follow this. [¶] I mean, I was like \$80,000 owed most of the time—the entire time I was there. So, yeah, it doesn't line up with—with anything and—

"Q Okay. So let's break this down. [¶] So for paragraph 1 or—yeah, section 1 of the agreement on page D, Bates stamped D137, it says [¶] "The bonus structure for Commercial Project Developers is as follows: A Commercial Project Developer ("CPD") will be paid a bonus of 10 cents . . . per CEC-AC watt on projects for which that CPD is the primary bidder and Sullivan Solar Power . . . wins the

bid, in accordance with the requirements set forth in the agreement.'
[¶] Okay. What is 'CECAC'? What does that mean?

"A California Energy Commission alternating current.

"Q Okay. So was that your understanding as to at least that portion of the bonus—

"A Yeah.

"Q —would be based on AC watts; right?

A Yes.

"Q Ten cents per AC watt for projects for which you are the primary bidder?

"A Yes.

"Q Okay. So that you don't have any problem with. [¶] Section 2 says, [¶] 'CPD's will be paid \$1000 when a project is approved for processing. The \$1000 will be deducted from the total bonus calculated in section 1 above. A percentage of the remaining balance of the bonus set forth in section 1, above, will be paid based on the percentage of the contract value which has been paid to the company with ten percent of each bonus payment retained until the project is paid in full and . . . the following requirements' have been 'met,' and then it sets forth some requirements. [¶] Was that your understanding as to how that would work at the time you signed page 2 of this agreement?

"A That's the problem.

"Q Yeah, that's what I'm asking. So what's—

"A No.

"Q —what's your understanding—

"A My understanding—

"Q Of what it was going to be?

"A My understanding is that if I collected more than what was—than what was basically in the contract—there was a thousand dollars that we would take on the initial deposit. [¶] If I was going to get more than that, then I would get more than a thousand dollars as the initial payment. [¶] So that—that's kind of a red flag for me when I'm looking at this, because that's not correct. That wasn't altered to what we agreed to.

"Q Now, were there jobs that you did get paid—strike that. [¶] So you're saying if the company got paid more pursuant to the contract than what is anticipated in this agreement, then you would get some portion of that extra money?

"A Correct.

"Q Yes?

"A Yes.

"Q And do you know whether that was agreed upon at the time this was signed or something that you and Daniel [Sullivan] discussed after?

"A I don't remember. I don't remember.

"Q Okay. So it's—

"A That's why I'm—

"Q Yeah. [¶] So it's possible that this is what the original deal was and then you altered it to—based on circumstances that occurred later?

"A I don't know. That's why I'm leery of the first page. The second page is great." [¶] . . .

"Q Okay. Paragraph 4 says, [¶] 'A CPD who is discharged or resigns prior to a bonus being earned on a project for which the CPD was the primary bidder and the Company' wins 'the bid will continue to earn . . . bonus payments for that project if on site work has commenced for the project prior to the CPD's last day of employment.' [¶] Do you see that?

"A I do.

"Q Was that your understanding of the agreement when you signed this page 2 of the document?

"A I believe so.

"Q Is anything contained in that provision inconsistent with your understanding of your agreement with Sullivan Solar?

"A The fact that nothing is on this contract with my signature on there, that's kind of—

"Q No. I'm asking you about that—that—

"A No—

"Q —one sentence.

"A —I don't remember. [¶] . . . [¶] I don't remember.

"Q Then it goes on to say, [¶] 'If work has not commenced prior to the last day of employment, no further bonuses shall be paid to the CPD beyond any payments already paid to the CPD.' [¶] Was that your understanding of the agreement at the time you signed page 2?

"A I don't remember.

"Q Do you have any recollection of there being any other agreement regarding what happens when your employment ceases?

"A No.

"Q Do you recall ever seeing a different page 1 to this agreement that you're looking at now?

"A There's no page numbers or anything. So I don't know. I'm not sure.

"Q Okay. [¶] Well, you'll agree that the page you signed looks like it's not the only page of the agreement; right? It starts with Roman numeral ii; right?

"A Yeah.

"Q Okay. [¶] So there's likely at least one page that goes before the page you signed; right?

"A I agree with that, yeah, definitely.

"Q Okay. [¶] Do you recall ever seeing a different page or pages that go with the signature page?

"A No.

"Q You said that how the company actually paid the bonus reflected in paragraph 2 was different than what is contained in paragraph 2; right?

"A Yes.

"Q Did you ever see any written agreement or document that set forth the payment of that bonus that was actually consistent with what happened, or is this the only written document you've seen regarding the bonus payment?

"A Can you repeat that?

"Q Sure. I knew you would ask. [¶] Do you recall ever seeing any other document that set forth the payment of bonuses that was different than what's in this document?

"A Yeah, because I think we went back and forth on this because I wasn't happy with it. So we went back and forth with it, and those were—that part of it—like the red flag part, that's one of the discussions we had.

"Q Okay. [¶] Do you recall signing any documents other than this document?

"A Over the years for sure, yeah.

"Q Strike that. Let me ask it. [¶] Did you sign more than one agreement relating to your compensation as a commercial project developer?

"A Probably in my time there I would say so.

"Q Remember, you served as project developer for less than a year; right? Commercial project developer.

"A No. I did commercial project development the entire time I was there.

"Q Okay. Was your title ever commercial project developer prior to 2014?

"A No.

"Q Okay. [¶] So I'm talking about the time during which you served only as a commercial project developer. You signed some agreement regarding compensation for that position; correct?

"A I did.

"Q Okay. Do you recall signing anything other than that one agreement regarding compensation as a commercial project developer?

"A Probably just one, yeah.

"Q So as you sit here today you just don't know if this is the right first page for the document?

"A Yeah. Because there's nothing on there with my signature on it.

"Q Did you typically initial every page of a document that you were gonna sign?

"A Typically, yeah. Pretty much do that notoriously now because that's how we do—that's how Sullivan does their contracts so I know it's a good thing to do."

Mazelli's deposition testimony establishes that he signed a two-page agreement with Sullivan, that he signed the second page of the agreement, and that he recognized his signature on the second page of the document marked as exhibit 3. After being given an

opportunity to examine the first page of exhibit 3, Mazelli was not certain that it was the first page of the agreement he had signed.

Mazelli stated that he did not know whether the first page of exhibit 3 was the first page of his compensation agreement because he did not sign that page and he typically initialed every page of a document that he signed. Mazelli had no recollection of any other agreement regarding what happened when his employment ended, and he was "not sure" whether he ever saw a different page 1, other than the page contained in exhibit 3. Mazelli also testified that page 1 of exhibit 3 was inconsistent with his recollection of the agreement that he had signed and negotiated. He stated, "I never got paid like this," and that page 1 of exhibit 3 was inconsistent with regard to the "earned bonus requirement we negotiated" and that it did not "line up with—with what we spoke about." Specifically, Mazelli stated with regard to the "earned bonus requirement" that he "never [got paid] until the project was done. It would never follow this."

As to paragraph 4 of exhibit 3, Mazelli testified he believed that the first sentence of paragraph 4 reflected his understanding of the agreement when he signed the second page of his compensation agreement, but he could not remember if anything in paragraph 4 of exhibit 3 was inconsistent with his agreement with Sullivan. When asked about the third sentence in paragraph 4 of exhibit 3 that pertained to no bonuses being paid if work had not commenced on a project prior to the last day of employment, Mazelli could not remember if that sentence reflected his understanding of his compensation agreement when he signed the second page of exhibit 3.

Mazelli's deposition testimony shows that he could not attest that page 1 of exhibit 3 was a genuine copy of the first page of his compensation agreement with Sullivan. Accordingly, the trial court correctly ruled that the purported compensation agreement had not been authenticated and was inadmissible. In his reply brief, Mazelli cited his deposition testimony that he "believe[d]" paragraph 4 of exhibit 3 reflected his understanding of his agreement with Sullivan when he signed the second page of his compensation agreement. While this testimony suggests that the language in paragraph 4 of exhibit 3 reflected his agreement with Sullivan, this testimony does not assist him because Mazelli was unable to authenticate the document that contained paragraph 4. Accordingly, the trial court properly disregarded the purported compensation agreement when ruling on Sullivan's motion. (Code Civ. Proc., § 437c, subd. (c).)

III. THE TRIAL COURT PROPERLY GRANTED SULLIVAN'S MOTION

In moving for summary adjudication of Mazelli's first cause of action for unpaid wages, Sullivan relied on Mazelli's deposition testimony to establish when Mazelli would have earned bonuses on the two projects. Specifically, Mazelli stated that to earn a bonus on a project two conditions needed to be satisfied before his employment ended: (1) construction had to be completed and (2) full payment by the customer had to be received. Counsel then confirmed his understanding of these conditions:

"Q So the project needed to have been completely built and the customer would have had to pay it before you left the company for you to earn the bonus?

"A Yeah."

Mazelli testified, however, that he was not the accountant and did not know whether all the money had been collected on the two projects. In support of its motion, Sullivan presented evidence that it did not complete construction or receive final payment on both projects before Mazelli resigned his employment in June 2015. Mazelli did not dispute this evidence; rather, he argued that the evidence was immaterial because paragraph 4 of his compensation agreement set forth the terms of when he earned a bonus. As addressed *ante*, the trial court properly ruled that the purported compensation agreement was inadmissible. (*Ante*, pt. II.) Accordingly, Mazelli failed to show the existence of a triable issue of material fact on his first cause of action for unpaid wages.

Mazelli's second and fourth causes of action for waiting time penalties and penalties for failure to provide accurate wage statements are based on Sullivan's failure to pay bonuses on the two projects and for failing to include these bonus payments on his wage statements. Mazelli has not shown that Sullivan owed him any wages. Accordingly, his second and fourth causes of action fail. Finally, Mazelli's third cause of action for violation of Business and Professions Code alleged that Sullivan's Labor Code violations constituted an business practice. Because Mazelli has not shown any Labor Code violations, this derivation cause of action fails. (*Price v. Starbucks Corp.* (2011) 192 Cal.App.4th 1136, 1147.)

DISPOSITION

The judgment is affirmed. Respondent is entitled to its costs on appeal.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.